Petition

81-1477

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

JOHN F. WELLS, INDIVIDUALLY, AND THE PEOPLE OF THE STATE OF ARKANSAS, UPON THE RELATION OF JOHN F. WELLS ..... *Petitioners*

vs.

FRANK WHITE, GOVERNOR, PAUL RIVIERE, SECRETARY OF STATE, AND STEVE CLARK, ATTORNEY GENERAL, CONSTITUTING THE BOARD OF APPORTIONMENT OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED

With regard to the 1981 reapportionment of the Arkansas General Assembly, whether the one-man/one-vote rule of *Reynolds* v. *Sims*, 377 U.S. 533, overrides provisions of the Arkansas Constitution requiring that each Arkansas county have at least one state Representative and that no county lines be crossed in the formation of state Senatorial districts.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners John F. Wells, individually, and the People of the State of Arkansas, upon the relation of John F. Wells, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on November 2, 1981.

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 274 Ark. S. Ct. Advance Reports 197 and 623 S.W. 2d 187. A copy of the opinion appears in the Appendix hereto, at pages 3 through 6.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on November 2, 1981. A timely petition for rehearing was denied on November 23, 1981 (Appendix, p. 7), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

With regard to the 1981 reapportionment of the Arkansas General Assembly, whether the one-man/one-vote rule of *Reynolds* v. *Sims*, 377 U.S. 533, overrides provisions of the Arkansas Constitution requiring that each Arkansas county have at least one state Representative and that no county lines be crossed in the formation of state Senatorial districts.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment 14, § 1.

. . . No state . . . shall deny to any person within its jurisdiction the equal protection of the law.

Constitution of Arkansas:

Article 6, §3 (Appendix, p. 8)

Article 7, §6 (Appendix, p. 8)

Article 8 (Appendix, pp. 8, 9)

Article 13 (Appendix, pp. 9, 10)

Amendment No. 7 (Appendix, p. 10)

Amendment No. 28 (Appendix, pp. 11, 12)

Amendment No. 45 (Appendix, pp. 13, 14)

Amendment No. 51 (Appendix, pp. 15, 16)

Amendment No. 55 (Appendix, pp. 16-18)

STATEMENT OF THE CASE

Under Amendment No. 45 to the Constitution of Arkansas (Appendix, pp. 13, 14), apportionment of the Arkansas General Assembly, which consists of the 35-member Senate and the 100-member House of Representatives, is accomplished as follows: in the year following the Federal census, the Governor, the Secretary of State and the Attorney General, constituting the Board of Apportionment, apportion representatives. If the Board fails to act, the Supreme Court of Arkansas is vested with original jurisdiction to compel the Board to perform its duty. That Court also has original jurisdiction, upon the filing of a timely application, to revise any arbitrary action or abuse of discretion in the Board's apportionment.

On July 13, 1981, Respondents Frank White, Governor, Paul Riviere, Secretary of State, and Steve Clark, Attorney General, acting as the Board of Apportionment, filed their Order and Report, apportioning both chambers of the Arkansas General Assembly. On July 17, 1981, Petitioner John F. Wells, individually, and the People of the State of Arkansas, upon the relation of John F. Wells, timely filed an original action (Appendix, pp. 19-21) in the Supreme Court of Arkansas, asking that Court, among other things, to revise the Board's apportionment plan so that each county would have at least one representative and no county lines would be crossed in the formation of senatorial districts.

Initially, by means of a Motion To Dismiss (Appendix, pp. 22, 23), the Board responded that Petitoners' claim should be denied out of hand because the pertinent provisions of Amendment No. 45 were in conflict with the Equal Protection Clause of the United States Constitution and, because of population disparities, allocating at least one representative to each county would run afoul of the one-man/one-vote rule of

Reynolds v. *Sims*, 377 U.S. 533. In their Response To Motion To Dismiss (Appendix, pp. 24, 25), Petitioners argued that *Mahan* v. *Howell*, 410 U.S. 315, had rewritten the one-man/one-vote rule, and population was no longer the initial or overriding consideration.

The Motion To Dismiss was denied and the action was submitted to the Supreme Court of Arkansas on briefs.

In their Abstract And Brief (Appendix pp. 26-33), Petitioners urged that the Constitution of Arkansas conferred upon Arkansas counties constitutional protection of their existence, territorial integrity and self-government which, under *Mahan* v. *Howell, supra*, made it proper to apportion the Arkansas House of Representatives so that each county had at least one representative and to apportion the Arkansas Senate so that no county lines were crossed in the formation of senatorial districts.

In their Reply Brief (Appendix, pp. 34-39), Petitioners specifically argued for the application of the "Federal analogy" to the apportionment of the Arkansas House of Representatives.

The Supreme Court of Arkansas denied the Petitioners' requested relief, finding that under current Federal law ". . . the paramount consideration is the numerical equality of the districts. *Mahan* v. *Howell, supra.*" (Appendix, p. 5). The Court went on to state:

> The only matter for consideration before this court is whether county boundary lines may be traversed in the formation of legislative and senatorial districts. The answer to the question is that the Board of Apportionment may cross county lines in the formation of districts

whenever it is necessary to comply with the Fourteenth Amendment to the Constitution of the United States.

(Appendix, p. 6)

REASONS FOR GRANTING THE WRIT

1. THE PROCEDURES AND THE SUBSTANCE OF THE ARKANSAS LEGISLATIVE APPORTIONMENT SYSTEM, NEITHER OF WHICH HAS BEEN CLOSELY EXAMINED BY THIS COURT, RESOLVE MANY OF THE RECURRING PROBLEMS WITH AND OBJECTIONS TO THE APPORTIONMENT SYSTEMS IN OTHER STATES.

In announcing the principle of one-man/one-vote in state legislative apportionment, this Court chose what it regarded as the most outrageous and offensive example of the abuse it wanted to end: the rural stranglehold on the state legislature.

As recited in *Reynolds* v. *Sims, supra,* an unusual combination of factors first gave rise to and then reinforced the growth of the stranglehold.

> No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people, or as a result of a constitutional convention convened after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature.

377 U.S. 553, 554. In addition, the Alabama Supreme Court had previously held that ". . .it would not interfere with matters of legislative apportionment." *Id.* at 541. The rural stranglehold on the Alabama Legislature developed in spite of a specific provision in the Alabama Constitution requiring that legislative apportionment be based upon population because the Alabama Legislature could not be compelled by the State's court system or by the State's voters to perform its

constitutional duty. The District Court had stated that compliance with that provision would have eliminated federal constitutional objections to such an apportionment, *Id.* at 543.

Procedurally, the Arkansas legislative apportionment system is unique because it is free from the problem of legislative inaction on apportionment. Originally, under Article 8 to the Constitution of Arkansas (Appendix, pp. 8, 9), the Arkansas General Assembly was required to reapportion itself periodically, but precisely because it failed and refused to properly discharge that duty, in 1936 the voters of Arkansas adopted initiated* Amendment No. 23 to the Constitution of Arkansas (Appendix, pp. 11, 12). That Amendment completely terminated the Arkansas General Assembly's active participation in the apportionment process. Amendment No. 45 (Appendix, pp. 13, 14), initiated and adopted in 1956, procedurally is almost identical to Amendment No. 23.

Under the Arkansas apportionment system, the Governor, the Secretary of State and the Attorney General, each elected on a statewide basis, Constitution of Arkansas, Article 6, §3 (Appendix, p. 8), constituting the Board of Apportionment, Amendment Nos. 23 and 45, are charged with the imperative duty of performing the legislative apportionment, according to the guidelines set forth in those Amendments. Upon the Board's refusal to act or their acting in an arbitrary manner or abusing their discretion, any citizen or taxpayer may timely petition the Supreme Court of Arkansas to compel the Board to make its apportionment or to revise an arbitrary apportionment. Each of the seven justices constituting the Supreme Court of Arkansas is likewise elected on a state-wide basis, Constitution of Arkansas, Article 7, §6. (Appendix, p. 8). Under the Arkansas apportionment system, each person actually or potentially involved in the apportionment process, except for the citizen/taxpayer invoking Supreme Court of

*Under Amendment No. 7 to the Constitution of Arkansas (Appendix, p. 10), 10% of the legal voters may propose a constitutional amendment by initiative petition.

Arkansas jurisdiction, must periodically account to all Arkansas voters for the manner in which he performed his public trust. Of equal importance, the voters of Arkansas, as demonstrated by the adoption of initiated Amendment Nos. 23 and 45, have exercised their right to initiate constitutional amendments on the question of legislative apportionment.

Substantively, the Arkansas legislative apportionment system provides (1) that each county shall have at least one representative, with the remaining 25 representatives ". . . equally distributed (as nearly as practicable) among the more populous counties . . . ," on a ratio basis, Amendment No. 45, and (2) that "no county shall be divided in the formation . . ." of senatorial districts, with ". . .each Senator representing, as nearly as practicable, an equal number . . . [of inhabitants]." Amendment No. 23*

The substance of the Arkansas legislative apportionment system has been before this Court on two occasions: *Yancey* v. *Faubus, Governor*, E.D. Ark., 1965, 251 F. Supp. 998, aff'd on motion, *Crawford County Bar Ass'n.* v. *Faubus*, 383 U.S. 271 and *Kelly* v. *Bumpers*, E.D. Ark., 1972, 340 F. Supp. 568, aff'd, 413 U.S. 901.** Since this Court issued no opinion in either

*Amendment No. 45 differs significantly with the substance of Amendment No. 23 only on the apportionment of Senators. Amendment No. 45 attempted to freeze the senatorial districts as they existed in 1956. Obviously, in the Arkansas legislative system, under which political subdivision (counties) representation is achieved in the House of Representatives, per capita representation must be achieved in the Senate. There can be no denying that the attempt to remove the per capita representation requirement from the Arkansas Senate, thereby creating a sort of stranglehold on the General Assembly, must fall as violative of the Equal Protection Clause of the United States Constitution; thus, the apportionment of the senatorial districts reverts to Amendment No. 23. The Supreme Court of Arkansas so held in its opinion below. (Appendix, p. 4)

**The *Yancey* v. *Faubus, Governor*, decision primarily concerned a remedy proposed by the Defendants therein to an earlier decision in the same case by the same judges, reported at 238 F. Supp. 290, in which the substance of the Arkansas legislative apportionment system was held unconstitutional under *Reynolds* v. *Sims, supra*. For some unknown reason, no appeal was ever taken, or apparently even attempted, from that initial decision.

affirmance, it is fruitless to speculate about the depth of this Court's previous examination of the Arkansas legislative apportionment system, and such speculation is unnecessary because the substance of state legislative apportionment must now be measured by the rule of *Mahan* v. *Howell*, 410 U.S. 315.

The Arkansas legislative apportionment system has already solved the problem of the rural stranglehold on the State legislature. The procedure of the system totally forecloses the possibility of legislative inaction on or interference with the apportionment process. The substance of the system — allocating at least one representative per county, with the remaining 25 apportioned among the more populous counties on a population basis, and senatorial districts of equal population in which county lines are not crossed — embodies the "Federal analogy," clearly reflects the State's rational constitutional policy on the status of counties, and virtually eliminates gerrymandering. Together, the procedures and substance of the Arkansas legislative apportionment system and the relative ease with which citizens can amend the Constitution of Arkansas eliminate most of the virtually intractable problems that continually haunt this Court in its unceasing attempt ". . . to resolve this seemingly interminable problem . . . [of legislative apportionment]." *Chapman* v. *Meier*, 420 U.S. 1, 27.

The Arkansas legislative apportionment system's solution to this Court's continuing problems in the area of legislative apportionment justifies granting the writ to review the Arkansas system.

2. THE STATUS OF COUNTIES UNDER THE CONSTITUTION OF ARKANSAS FULLY JUSTIFIES THE APPLICATION OF THE "FEDERAL ANALOGY" TO THE APPORTIONMENT OF THE ARKANSAS GENERAL ASSEMBLY PURSUANT TO THE CONSTITUTION OF ARKANSAS.

In *Reynolds* v. *Sims*, 377 U.S. 533, this Court held that the "federal analogy" could not be relied upon to justify departure from representation based solely upon population in either house of a bicameral state legislature. In three of the five reapportionment companion cases also decided on June 15, 1964, this holding was cited as the basis for denying application of the "federal analogy" in New York, Maryland and Virginia.* Apparently, the underlying rationale behind this holding is that the relationship between counties, as a class, and the state is, in no meaningful way, similar to the relationship between the States, as a class, and the Federal government.

> . . .Alabama counties are merely involuntary political units of the State created by statute to aid in the administration of state government.

377 U.S. 547, 548.

> Political subdivisions of States — counties, cities or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178, these gov-

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*WMCA, Inc. v. Lomenzo, 377 U.S. 633, *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, and *Davis* v. *Mann*, 377 U.S. 678.

> ernmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and the "number, nature and duration of the powers conferred upon [them]. . . and the territory over which they shall be exercised rests in the absolute discretion of the State." The relationship of the States to the Federal government could hardly be less analogous.

Id. at 575.

> Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements.

Id. at 573. It was only grudgingly admitted that ". . . the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union'." *Id.* at 574.

This view of counties does not accurately describe the relationship between Arkansas counties, as a class, and the State government. Under the Constitution of Arkansas, the county is the basic geographic unit of local government. The territorial integrity of each county is insulated from State-level meddling. Alteration of county lines and establishment or change of a county seat requires approval by a majority of the qualified voters in the affected county. Constitution of Arkansas, Article 8, §§2, 3 and 4 (Appendix, pp. 8, 9). Counties possess limited but substantial "local legislative authority," Constitution of Arkansas, Amendment No. 55 (Appendix, pp. 16-18), and the county is the basic voting and voter registration unit. To qualify to vote, a person must register in the county of his/her residence, Constitution of Arkansas, Amendment No. 51, §§1, 2 and 3 (Appendix, pp. 15, 16). Upon changing

legal residence to another county, the person must register in the new county of residence, *Id.*, §10(b) (Appendix, p. 16).

Petitioners do not claim that Arkansas counties have precisely the same "sovereignty" in relationship to the State of Arkansas as the State has in relationship to the Federal government, but such sovereignty is unnecessary to justify the application of the "federal analogy" to the apportionment of the Arkansas General Assembly so that each county will have at least one representative and no county line will be crossed in the formation of senatorial districts of equal population. Because Arkansas counties are blessed with constitutional protection of their existence, territorial integrity and self-government, the State of Arkansas must be free, in order to attain this legitimate public interest, to guarantee that each county will have at least one voice in the General Assembly.

The differences between the counties of Arkansas and the counties of Alabama justify granting certiorari to review the application of the "Federal analogy" to state re-apportionment.

3. THE DECISION BELOW CONFLICTS IN PRINCIPLE AND IN SUBSTANCE WITH THE "RESPECTING THE BOUNDARIES OF POLITICAL SUBDIVISIONS" RULE OF *MAHAN VS. HOWELL*, 410 U.S. 315.

Mahan v. *Howell, supra,* signals a change in the manner in which a state legislative apportionment is measured against the Equal Protection Clause of the United States Constitution.

Previously, given a population variance among state legislative districts, the starting point was whether the magnitude of the variance was constitutionally permissible. Under *Mahan* v. *Howell, supra,* given a population variance, the starting point is the asserted justification for the variance.

If that justification is valid when measured against the Equal Protection Clause, the inquiry becomes whether the apportionment plan furthers the justification. If the plan furthers the justification, the final question is whether the variance is within tolerable limits. In effect, the rather general inquiry into the permissibility of the variance has been divided into its component parts in order to structure the inquiry and give some guidelines to its resolution.

Mahan v. *Howell, supra,* is, therefore, unique among this Court's legislative apportionment cases, and, perhaps because of that uniqueness, its import is not yet fully appreciated by the courts and by legislatures and/or boards responsible for legislative apportionment. Confusion as to the proper application of the rule of the case befell the Supreme Court of Arkansas and will undoubtedly befall other courts. Witness the following from the opinion below:

> A review of the cases on this subject [legislative apportionment] would indicate that the first consideration is that of equal population districts. The second guideline is the observation of local subdivision entities. Third guideline is that the reapportionment authority avoid multi-member districts whenever possible. Also it is proper to consider existing legislative districts, communities of interest, natural boundaries, incumbency and geographic interests.

(Appendix, pp. 5, 6) This review plainly summarizes the unstructured population variance procedure that existed prior to *Mahan* v. *Howell, supra,* and, on its face, demonstrates the superiority of the *Mahan* v. *Howell, supra,* approach.

This confusion as to the substance and proper application of the "respecting the boundaries of political subdivisions" rule of *Mahan* v. *Howell, supra,* justifies the granting of the writ.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arkansas.

Respectfully submitted,

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January 27, 1982

Appendix

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Office - Supreme Court
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No. _____

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APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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SUPREME COURT OF ARKANSAS

No. 81-160

John F. Wells, individually, et al.,

PETITIONERS,

V.

Frank White, Governor et al.,

RESPONDENTS.

Opinion Delivered Nov. 2, 1981

An Original action Under Amendment 45 to the Constitution of Arkansas

WRIT DENIED

JOHN I. PURTLE, Associate Justice

This is an original action in the Supreme Court of Arkansas for a Writ of Mandamus directing the Board of apportionment of the State of Arkansas, and its members individually, to redistrict the legislature in a manner whereby no county lines will be crossed in the formation of the various districts. Petitioners rely primarily upon Amendment 45 to the Constitution of Arkansas which requires the House of Representatives to be apportioned in a manner giving each county at least one representative. Amendment 45 requires that the Senate be composed of 35 members and that the senatorial districts be constituted in a manner directed by the Supreme Court of Arkansas in the case of *Pickens* v. *Board of Apportionment*, 220 Ark. 145, 246 S.W. 2d 556 (1952). Petitioners further rely on Amendment 23 to the Constitution of the State of Arkansas as well as Articles 8 and 13 of the original Arkansas Constitution of 1874. Additionally, petitioners urge that Amendment 55 relates to this subject inasmuch as it guarantees to each county a degree of self-government through the recognition of local legislative authority. The respondents resist the petition on the ground that the many decisions of the Supreme Court of the

United States hold that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires the legislature to be apportioned, as nearly as possible, on the one-man one-vote theory as set out in *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

We think the argument of the respondents must prevail for the reasons stated below.

We state in the beginning that Sections 2 and 3 of Amendment 45 have been held unconstitutional insofar as the boundary lines of the representative districts are concerned. *Yancey* v. *Faubus*, 238 Fed. Supp. 290 (1965), and *Faubus, Governor* v. *Kinney*, 239 Ark. 443, 389 S.W. 2d 887 (1965). These decisions did not change the number of representatives and senators but merely changed the manner in which the various districts were constituted. Even if we considered both Section 3 and 4 of Amendment 45 to be entirely unconstitutional, we would fall back then upon Amendment 23 to the Constitution of the State of Arkansas. Sections 2 and 3 of Amendment 23 also provide that each county shall have at least one representative and that the senatorial districts shall not divide any county into separate districts. Therefore, Amendment 23, as it relates to the boundaries of the various districts is likewise unconstitutional in that it violates the principle of one-man one-vote. The original Article 8 of the Arkansas Constitution of 1874 provided for 100 members in the House of Representatives and 35 members in the Senate. This article provided the same as Amendments 23 and 45 that of the 100 representatives one must be elected from each county and that the senatorial districts could not be constituted in a manner to divide a county into separate districts. Likewise, Article 8 has the same infirmities as do Amendments 23 and 45.

Although a number of decisions have held that it was

proper for the reapportionment authority to consider county and district lines in the formation of reapportionment plans, the cases still hold that the paramount consideration is the numerical equality of the districts. *Mahan* v. *Howell*, 410 U.S. 315 (1973). The central theme of all the United States Supreme Court decisions reviewed pertaining to reapportionment of state legislators is that there must be a good faith effort to construct the districts in a manner as nearly as possible of equal population.

The latest decision on this subject involves the 1981 reapportionment of the Virginia legislature. The three-judge federal district court held in *Cosner* v. *Dalton*, No. 81-0492-R (D.C. Va., August 25, 1981), that *Reynolds*, supra, is still the standard by which reapportionment plans are measured. The district court in *Cosner* held the present Virginia plan to be unconstitutional on its face. Although the case is on appeal to the United States Supreme Court, we are of the opinion that *Cosner* reflects the present attitude of the federal courts toward the problem of reapportionment of state legislators. The above decision quoted *Chapman* v. *Meier*, 420 U.S. 1 (1975), as follows:

> Unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multi-member districts, and, as well, must ordinarily achieve the goal of population equality of *de minimus* variation.

The court further held that plans departing from such standards must articulate precisely why single member districts were not adopted. A review of the cases on this subject would indicate that the first consideration is that of equal population districts. The second guideline is the observation of local subdivision entities. A third guideline is that the reapportionment

authority avoid multi-member districts whenever possible. Also, it is proper to consider existing legislative districts, communities of interest, natural boundaries, incumbency and geographic interests.

The 1981 Virginia plan was struck down as facially unconstitutional because the deviation among the populations of the districts exceeds the limits of toleration authorized by the equal protection clause.

We do not have before us the question of whether the population of the various districts violates the equal protection clause as mandated by the federal courts. The only matter for consideration before this court is whether county boundary lines may be traversed in the formation of legislative and senatorial districts. The answer to the question is that the Board of Apportionment may cross county lines in the formation of the districts whenever it is necessary to comply with the Fourteenth Amendment to the Constitution of the United States. Some counties in Arkansas have a population of less than 7,000 and other counties have population well in excess of 90,000. Therefore, without any examination of the numerical numbers in the present plan of reapportionment, we must say that it is obviously necessary to deviate from county lines in order to achieve anything in the arena of equal population among the districts. Therefore, we must deny the petition.

Writ denied.

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

November 23, 1981

DONA L. WILLIAMS
CLERK

James F. Lane
Attorney at Law
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Re: 81-160 John F. Wells et al
v. Frank White, Governor et al

Dear Mr. Lane:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Dona L. Williams
Clerk

CONSTITUTION OF ARKANSAS

(Adopted 1874)

Article 6 — Executive Department

• • •

Sec. 3. The Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney General shall be elected by the qualified electors of the State at large at the time and places of voting for members of the General Assembly . . . .

Article 7 — Judicial Department

• • •

Sec. 6. . . . . The judges of the Supreme Court shall be elected by the qualified electors of the State . . . .

Article 8 — Apportionment

• • •

Sec. 1. The House of Representatives shall consist of not less than seventy-three, nor more than one hundred members. Each county now organized shall always be entitled to one representative, the remainder to be apportioned the several counties according to the number of adult male inhabitants, taking two thousand as a ratio, until the number of representatives amounts to one hundred, when they shall not be further increased; but the ratio of representation shall from time to time, be increased, as hereinafter provided, so that the representatives shall never exceed that number. And until the enumeration of inhabitants is taken by the United States government, A.D. 1880, the representatives shall be apportioned among the several counties, as follows . . . [interim apportionment omitted]

Sec. 2. The legislature shall from time to time divide the State into convenient senatorial districts in such manner that the Senate shall be based upon the adult male inhabitants of

the State, each senator representing an equal number as nearly as practicable, and until the enumeration of the inhabitants is taken by the United States government, A.D. 1880, the districts shall be arranged as follows . . . [interim apportionment omitted]

Sec. 3. Senatorial districts shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senatorial district.

Sec. 4. The division of the State into senatorial districts and the apportionment of representatives to the several counties shall be made by the General Assembly at the first regular session after each enumeration of the inhabitants of the State by the Federal or State Government shall have been ascertained, and at no other time.

Article 13 — Counties, County Seats and County Lines

Sec. 1. No county now established shall be reduced to an area of less than six hundred square miles nor less than five thousand inhabitants; nor shall any new county be established with less than six hundred square miles and five thousand inhabitants. Provided, that this section shall not apply to the Counties of Lafayette, Pope and Johnson, nor be so construed as to prevent the General Assembly from changing the line between the Counties of Pope and Johnson.

Sec. 2. No part of the county shall be taken off to form a new county or part thereof without the consent of a majority of the voters in such part proposed to be taken off.

Sec. 3. No county seat shall be established or changed without the consent of a majority of the qualified voters of the county to be affected by such change, nor until the place at which it is proposed to establish or change such county seat shall be fully designated. Provided, that in formation of new

counties the county seat may be located temporarily by provision of law.

Sec. 4. In the formation of new counties no line thereof shall run within ten miles of the county seat of the county proposed to be divided, except the county seat of Lafayette County.

Sec. 5. Sebastian County may have two districts and two county seats, at which county, probate and circuit courts shall be held, as may be provided by law, each district paying its own expenses.

AMENDMENT NO. 7
(Initiative and Referendum)

Art. V, Sec. 1. The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill.

Initiative — The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a Constitutional Amendment by initiative petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for State-wide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing, the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation. . . .

• • •

AMENDMENT NO. 23
(The Board of Apportionment)

Section 1. A Board to be known as "The Board of Apportionment", consisting of the Governor (who shall be chairman), the Secretary of State and the Attorney General, is hereby created and it shall be its imperative duty to make apportionment of representatives and senators in accordance with the provisions hereof; the action of a majority in each instance shall be deemed the action of said Board.

Sec. 2. The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with ratio to be determined by the population of said counties as shown by the Federal census next preceding any apportionment hereunder.

Sec. 3. The Senate shall consist of thirty-five members. Senatorial districts shall at all times consist of contiguous territory, and no county shall be divided in the formation of such districts. "The Board of Apportionment" hereby created shall, from time to time, divide the State into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the State, each Senator representing, as nearly as practicable, an equal number thereof; each district shall have at least one Senator.

Sec. 4. The Board shall make the first apportionment hereunder within ninety days from January 1, 1937; thereafter, on or before February 1 immediately following each Federal census, said Board shall reapportion the State for both Representatives and Senators, and in each instance said Board

shall file its report with the Secretary of State, setting forth: (a) the basis of population adopted for representatives; (b) the basis for senators; (c) the number of representatives assigned each county; (d) the counties comprising each senatorial district and the number of Senators assigned to each, whereupon, after thirty days from such filing date, the apportionment thus made shall become effective unless proceedings for revision be instituted in the Supreme Court within said period.

Sec. 5. Original jurisdiction (to be exercised on application of any citizen and taxpayer) is hereby vested in the Supreme Court of the State: (a) to compel by mandamus or otherwise the Board to perform its duties as here directed, and (b) to revise any arbitrary action of or abuse of discretion by the Board in making any such apportionment; provided, any such application for revision shall be filed with said Court within thirty days after the filing of the report of apportionment by said Board with the Secretary of State, if revised by the Court, a certified copy of its judgment shall be by the clerk forthwith transmitted to the Secretary of State, and thereupon be and become a substitute for the apportionment made by the Board.

Sec. 6. At the next general election for State and County officers ensuing after any such apportionment, senators and representatives shall be elected in accordance therewith and their respective terms of office shall begin on January 1 next following. At the first regular session succeeding any apportionment so made, the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years and the remaining seventeen for four years, after which all shall be elected for four years until the next reapportionment hereunder.

(Proposed by Initiative Petition. Voted upon at the General Election, November 3, 1936. Returns: For, 93,753; against, 48,952. Declared adopted by the Speaker of the House, January 12th, 1937.)

AMENDMENT NO. 45
(To Preserve Present Apportionment of State Senators and Existing Senatorial Districts)

Section 1. **Board of Apportionment Created — Powers and Duties.** A Board to be known as "The Board of Apportionment", consisting of the Governor (who shall be Chairman), the Secretary of State and the Attorney General is hereby created and it shall be its imperative duty to make apportionment of representatives in accordance with the provisions hereof; the action of a majority in each instance shall be deemed the action of said board.

Sec. 2. **One Hundred Members In House of Representatives — Apportionment.** The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the population of said counties as shown by the Federal census next preceding any apportionment hereunder.

Senatorial Districts — Thirty-Five Members of Senate. The Senate shall consist of thirty-five members. Senatorial districts as now constituted and existing, as heretofore directed by the Supreme Court of Arkansas in the case of *Pickens v. Board of Apportionment*, 220 Ark. 145, 246 S.W. 2d 556, shall remain the same and the number of Senators from the districts shall not be changed.

On or before February 1 immediately following each Federal census, said Board shall reapportion the State for Representatives, and in each instance said Board shall file its report with the Secretary of State, setting forth (a) the basis of

population adopted for representatives; (b) the number of representatives assigned to each county; whereupon, after 30 days from such filing date, the apportionment thus made shall become effective unless proceedings for revision be instituted in the Supreme Court within said period.

Mandamus to Compel Board of Apportionment to Act. Original jurisdiction (to be exercised on application of any citizens and taxpayers) is hereby vested in the Supreme Court of the State (a) to compel (by mandamus or otherwise) the Board to perform its duties as here directed and (b) to revise any arbitrary action of or abuse of discretion by the Board in making such apportionment; provided any such application for revision shall be filed with said Court within 30 days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the Court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Secretary of State, and thereupon be and become a substitute for the apportionment made by the Board.

Election of Senators and Representatives. At the next general election for State and County officers ensuing after any such apportionment, Representatives shall be elected in accordance therewith, Senators shall be elected henceforth according to the apportionment now existing, and their respective terms of office shall begin on January 1 next following. Senators shall be elected for a term of four years at the expiration of their present terms of office.

The provisions of the Constitution of the State of Arkansas in conflict with this Amendment are hereby repealed, and this Amendment shall take effect and be in operation immediately upon its approval and adoption by the people of the State of Arkansas, being self-executing and requiring no enabling act.

(Proposed by Initiative Petition filed in the office of the Secretary of State on

the 5th day of July, 1956. Voted on at the General Election November 6, 1956. Returns: For, 197,602; against, 143,100.)

AMENDMENT NO. 51
(Voter Registration Without Poll Tax Payment)

Section 1. **Statement of Policy.** The purpose of this Amendment is to establish a system of permanent personal registration as a means of determining that all who cast ballots in general, special and primary elections in this State are legally qualified to vote in such elections, in accordance with the Constitution of Arkansas and the Constitution of the United States.

Sec. 2. **Definitions.** As used in this Amendment, the terms:

(a) "County Board of Registration" means the County Board of Election Commissioners in each of the several counties of this State.

(b) "Permanent Registrar" means the County Clerk in each of the several counties of this State.

(c) "Deputy Registrar" means the Deputy County Clerk or clerical assistants appointed by the County Clerk.

(d) "Election" means any general, special or primary election held pursuant to any provisions of the Constitution or statutes of the State of Arkansas; provided, that this Amendment shall not apply to selection of delegates to party conventions by party committees or to selection of party committeemen by party conventions.

Sec. 3. **Application.** No person shall vote or be per-

mitted to vote in any election unless registered in a manner provided for by this Amendment.

• • •

Sec. 10. **Transfer and Change of Status.** (a) Upon a change of legal residence within the county, any registered voter may cause his registration to be transferred to his new address by signing a mailed request to the Permanent Registrar, giving his present address and the address at which he was last registered, or by applying in person at the office of the Permanent Registrar. . . .

(b) Upon a change of legal residence to another county within the State of Arkansas, an eligible voter must register again and shall record his former address in the spaces provided for such purpose in the Affidavit of Registration.

• • •

AMENDMENT NO. 55
(Revision of County Government)

Section 1. (a) A county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution or by law.

(b) No county may declare any act a felony or exercise any authority not relating to county affairs.

(c) A county may, for any public purpose, contract, cooperate, or join with any other county, or with any political subdivisions of the State or any other state or their political subdivisions, or with the United States.

Section 2. (a) No county's Quorum Court shall be

comprised of fewer than nine (9) justices of the peace, nor comprised of more than fifteen (15) justices of the peace. The number of justices of the peace that comprise a county's Quorum Court shall be determined by law. The county's Election Commission shall, after each decennial census, divide the county into convenient and single member districts so that the Quorum Court shall be based upon the inhabitants of the county with each member representing, as nearly as practicable, an equal number thereof.

(b) The Quorum Court may create, consolidate, separate, revise, or abandon any elective county office or offices except during the term thereof; provided, however, that a majority of those voting on the question at a general election have approved said action.

Section 3. The County Judge, in addition to other powers and duties provided for by the Constitution and by law, shall preside over the Quorum Court without a vote but with the power of veto; authorize and approve disbursement of appropriated county funds; operate the system of county roads; administer ordinances enacted by the Quorum Court; have custody of county property; hire county employees, except those persons employed by other elected officials of the county.

Section 4. In addition to other powers conferred by the Constitution and by law, the Quorum Court shall have the power to override the veto of the County Judge by a vote of three-fifths of the total membership; fix the number and compensation of deputies and county employees; fill vacancies in elective county offices; and adopt ordinances necessary for the government of the county. The Quorum Court shall meet and exercise all such powers as provided by law.

Section 5. Compensation of each county officer shall be

fixed by the Quorum Court within a minimum and maximum to be determined by law. Compensation may not be decreased during a current term; provided, however, during the interim, from the date of adoption of this Amendment until the first day of the next succeeding month following the date of approval of salaries by the Quorum Court, salaries of county officials shall be determined by law. Fees of the office shall not be the basis of compensation for officers or employees of county offices. Per diem compensation for members of the Quorum Court shall be fixed by law.

Section 6. All County Officers shall be bonded as provided by law.

Section 7. Sections 1 and 4 of this Amendment shall be effective January 1, 1977, and all other provisions hereof shall be effective when this Amendment is adopted.

Section 8. All parts of the Constitution of Arkansas in conflict with this Amendment are repealed.

IN THE SUPREME COURT OF ARKANSAS

JOHN F. WELLS, Individually, and
THE PEOPLE OF THE STATE OF ARKANSAS,
Upon the Relation of John F. Wells PETITIONERS

Vs. No. 81-160

FRANK WHITE, Governor,
PAUL RIVIERE, Secretary of State, and
STEVE CLARK, Attorney General,
Constituting the
BOARD OF APPORTIONMENT
of the State of Arkansas RESPONDENTS

PETITION

Under the provisions of Amendment 45 to the Constitution of the State of Arkansas, Petitioners invoke the original jurisdiction of this honorable Court as follows:

1. Petitioner John F. Wells, individually, resides in Pulaski County, Arkansas, wherein he is a qualified voter and a taxpayer. All other qualified voters in, residents of and taxpayers to the State of Arkansas have an immediate and vital interest in the issues presented in this proceeding, and Petitioner Wells brings this action in his own behalf and in behalf of all other Arkansas voters, residents and taxpayers.

2. Respondents Frank White, Governor; Paul Riviere, Secretary of State; and Steve Clark, Attorney General, constitute the Board of Apportionment of the State of Arkansas, and are named as Respondents herein in their capacities as members of said Board. On July 13, 1981, they filed with the

Secretary of State their official and final Order and Report, a copy of which is attached hereto and incorporated by reference, in which, by majority action, the State has been reapportioned for State Senate and Representative Districts through 1990.

3. Amendment 45 to the Constitution of Arkansas requires that each of the 75 Arkansas counties have at least one State Representative and that no county lines be crossed in the formation of State Senatorial Districts. Counties are the basic geographic unit of government within the State of Arkansas. The existence and territorial integrity of each Arkansas county is protected by Article 13 to the Constitution of Arkansas. Amendment 55 to the Constitution of Arkansas guarantees to each Arkansas county a degree of self-government through the recognition of "local legislative authority." Granting to each local geographic unit of government a voice in the Arkansas House of Representatives is a rational state policy, which is clearly and legitimately reflected by the mandates of Amendment 45.

4. The Respondents were without the authority or discretion to ignore the commands of Amendment 45 and, thereby, approve the apportionment plan contained in their Order and Report.

5. This Court should revise the apportionment plan contained in the Board of Apportionment's Order and Report in order to bring it into compliance with Amendment 45.

6. Petitioners believe that their Petition herein presents no issue of fact.

WHEREFORE, Petitioners John F. Wells, individually, and the People of the State of Arkansas, upon the relation of John F. Wells, pray judgment against Respondents Frank

White, Governor, Paul Riviere, Secretary of State, and Steve Clark, Attorney General, the Board of Apportionment of the State of Arkansas, declaring that each county in Arkansas is entitled to at least one State Representative and no county lines are to be crossed in the formation of State Senatorial Districts, declaring that the Respondents were without authority or discretion to select a plan of apportionment which does not comply with the commands of Amendment 45, revising the apportionment plan contained in the Respondents' Order And Report to bring it into compliance with Amendment 45, and granting them all other just and equitable relief.

JOHN F. WELLS, Individually, and THE PEOPLE OF THE STATE OF ARKANSAS Upon the Relation of John F. Wells

By: _____

/s/ James F. Lane
Their Attorney
212 Markham Tower East
500 East Markham Street
Little Rock, AR 72201
(501) 372-7810

FILED: July 17, 1981

IN THE SUPREME COURT OF ARKANSAS

JOHN F. WELLS, Individually, and
THE PEOPLE OF THE STATE OF ARKANSAS,
Upon the Relation of John F. Wells PETITIONERS

Vs. No. 81-160

FRANK WHITE, Governor,
PAUL RIVIERE, Secretary of State, and
STEVE CLARK, Attorney General,
Constituting the
BOARD OF APPORTIONMENT
of the State of Arkansas RESPONDENTS

MOTION TO DISMISS

Respondents Governor Frank White, Secretary of State Paul Riviere and Attorney General Steve Clark, as Members of the Arkansas Board of Apportionment, come before this Court in an original action, pursuant to Ark. R. Civ. P. 12(b)(6) and move this Court to dismiss Petitioners' Petition filed herein for the following reasons:

1. Petitioner fails to state a claim upon which relief can be granted as is required under Arkansas law. The provisions under which claim is made; namely, Sections 2 and 3 of Amendment 45 to the Arkansas Constitution of 1874 are in direct conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. The Arkansas Supreme Court is bound by the precedent of the United States Supreme Court and in an unbroken line of cases dating from 1964, the U.S. Supreme Court has upheld the "one man - one vote" rule enunciated in

Reynolds v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L. Ed. 2d 506 (1964). Its requirement that the membership of each house of the bicameral state legislature be apportioned so that, as nearly as practicable, each member of the respective houses represent the same number of people, makes it statistically impossible for each county in Arkansas to have one representative.

3. The issue of the constitutionality of Sections 2 and 3 of Amendment 45 to the Arkansas Constitution has been adjudicated by the United States District Court, Eastern District of Arkansas, Western Division, in *Yancey* v. *Faubus*, 238 F. Supp. 290 (1965) and is precedent for this Court.

4. The Arkansas Supreme Court has recognized that population equality is the overriding consideration in re-apportionment since *Shaw* v. *Adkins*, 202 Ark. 856, 153 S.W. 2d 415 (1941).

WHEREFORE, Respondents Governor Frank White, Secretary of State Paul Riviere and Attorney General Steve Clark, as Members of the Board of Apportionment of the State of Arkansas, respectively move that Petitioners' Petition be dismissed and for all other just and proper relief.

Respectfully submitted,

STEVE CLARK
Attorney General

By: _____

/s/ R. B. Friedlander
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007
Attorney for Respondents

IN THE SUPREME COURT OF ARKANSAS

JOHN F. WELLS, Individually, and
THE PEOPLE OF THE STATE OF ARKANSAS,
Upon the Relation of John F. Wells PETITIONERS

Vs. No. 81-160

FRANK WHITE, Governor,
PAUL RIVIERE, Secretary of State, and
STEVE CLARK, Attorney General,
Constituting the
BOARD OF APPORTIONMENT
of the State of Arkansas RESPONDENTS

RESPONSE TO MOTION TO DISMISS

In Response to the Motion to Dismiss filed herein by the Respondents Governor Frank White, Secretary of State Paul Riviere, and Attorney General Steve Clark, constituting the Board of Apportionment of the State of Arkansas, Petitioners John F. Wells, individually, and the People of the State of Arkansas, upon the relation of John F. Wells, state:

1. The issue presented in this proceeding is too important to resolve on a Motion To Dismiss.

2. The one man-one vote rule of *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), is dynamic, not static, and the cases of *Abate* v. *Mundt*, 403 U.S. 182, 91 S. Ct. 1904, 29 L. Ed. 2d 399 (1971), and *Mahan* v. *Howell*, 410 U.S. 315, 93 S. Ct. 797, 35 L. Ed. 2d 320 (1973), have virtually rewritten the rule.

3. In matters concerning the validity and interpretation of the Constitution of Arkansas, this honorable Court should be bound only by on-point decisions of the Supreme Court of the United States.

4. Population is a major consideration in reapportionment, but it is no longer the initial or overriding consideration.

5. The Motion To Dismiss should be denied, and this Court should establish a briefing schedule under which this case will be ready for submission not later than October 5, 1981.

WHEREFORE, Petitioners pray that the Motion To Dismiss be denied and that the Supreme Court of Arkansas establish a briefing schedule under which this case will be ready for submission not later than October 5, 1981.

JOHN F. WELLS, Individually, and
THE PEOPLE OF THE STATE OF ARKANSAS, Upon the Relation of John F. Wells

By _____
/s/ James F. Lane
Their attorney
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Little Rock, AR 72201
(501) 372-7810

FILED: August 18, 1981

Supreme Court of Arkansas

John F. Wells, Individually, and
The People of the State of
Arkansas Upon the Relation
of John F. Wells ..... *Petitioners*

Vs. No. 81-160

Frank White, Governor, Paul Riviere,
Secretary of State, and Steve Clark,
Attorney General, Constituting the
Board of Apportionment of the
State of Arkansas ..... *Respondents*

AN ORIGINAL ACTION
UNDER AMENDMENT 45 TO
THE CONSTITUTION OF ARKANSAS

ABSTRACT AND BRIEF
FOR PETITIONERS

JURISDICTIONAL STATEMENT

Original jurisdiction over this matter is expressly vested in this honorable Court by Amendment 45 to the Constitution of Arkansas.

STATEMENT OF THE CASE

On July 13, 1981, the Board of Apportionment of the State of Arkansas ("Board"), which then consisted of Governor Frank White, Secretary of State Paul Riviere and Attorney General Steve Clark, filed with the Office of the Arkansas

Secretary of State its Order and Report, which, by majority action, reapportioned the State of Arkansas for State House of Representative and State Senatorial Districts through 1990. On July 17, 1981, Petitioners John F. Wells, individually, and the People of the State of Arkansas, upon the relation of John F. Wells, filed their original Petition with this Court, asking the court to declare that each Arkansas county should have been assigned at least one State Representative and that no county lines be crossed in the formation of State Senatorial Districts and further asking the Court to revise the Respondents' reapportionment plan to bring it into compliance with the Constitution of Arkansas. Respondents filed a timely response. No briefing schedule has been established.

POINT TO BE RELIED UPON

THE BOARD ERRED IN NOT ASSIGNING AT LEAST ONE STATE REPRESENTATIVE TO EACH COUNTY AND IN NOT MAINTAINING THE INTEGRITY OF COUNTY LINES IN THE FORMATION OF STATE SENATORIAL DISTRICTS.

ABSTRACT OF THE RECORD

(Note: The record herein consists of only three documents which, as they appear in the record, are in reverse chronological order: the Board's Response, the Petition, and the Order and Report. No pages are numbered. Components of the record will be abstracted in their proper chronological order.)

ORDER AND REPORT

The Board determined the State's population to be 2,285,513, and fixed the ideal base population for a State House of Representative District at 22,855, for a State Senatorial

District at 65,300. Attached to the brief Order is a Report consisting of four appendices, which include a population breakdown for each individual House and Senate District and State maps on which House and Senate Districts have been drawn.

PETITION

Petitioners challenge the Board's reapportionment scheme because it failed to assign at least one Representative to each county and the integrity of county lines was not observed in the formation of State Senatorial Districts. Petitioners alleged that no issue of fact was presented. This honorable Court was asked to revise the apportionment plan to cure the foregoing constitutional defects.

RESPONSE

The Board's response was, in effect, a general denial of Petitioners' constitutional claims. The Board did admit that no question of fact is presented.

ARGUMENT

THE BOARD ERRED IN NOT ASSIGNING AT LEAST ONE STATE REPRESENTATIVE TO EACH COUNTY AND IN NOT MAINTAINING THE INTEGRITY OF COUNTY LINES IN THE FORMATION OF STATE SENATORIAL DISTRICTS.

In *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) and *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the Supreme Court of the United States plunged the federal judiciary headlong into a previously well defined and assiduously avoided political thicket: the

reapportionment of state legislatures. The subsequent reapportionment cases of the 1960s generally slavishly followed what has become known as the one man, one vote rule of *Reynolds* v. *Sims, supra.*

However, *Mahan* v. *Howell,* 410 U.S. 315, 93 S. Ct. 797, 35 L. Ed. 2d 320 (1973), the last major reapportionment decision of the 1970s, signals a substantial revision of the rule. That case was a challenge of the 1971 reapportionment of Virginia by the State's General Assembly, under which the House of Delegates districts, with one exception, followed political jurisdictional lines of the counties and cities and resulted in a 16.4% variation from the ideal district population.

The Supreme Court of the United States began its analysis by holding that the Equal Protection Clause standard by which state reapportionment plans are measured is that of *Reynolds* v. *Sims, supra,* not that of *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969) and *Wells* v. *Rockefeller,* 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 519 (1969); the latter two cases hold that on the issue of state reapportionment of federal congressional districts, very little population variance is permissible.

In the analysis of the Virginia reapportionment plan, note that population disparity was not the initial issue to be resolved. Rather, the Supreme Court of the United States first had to decide whether Virginia's rational policy of following political subdivision lines was furthered by the reapportionment plan. If so, the next issue was population deviation.

> The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergences in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences

> are also within tolerable limits. For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.

410 U.S. at p. 326.

In resolving those issues, the Supreme Court of the United States held that the House of Delegates reapportionment reasonably advanced Virginia's rational State policy of respecting political subdivision boundaries and that the 16.4% variance was permissible.

Constitution of Arkansas, Article 13, which is subtitled "Counties, County Seats and County Lines," provides:

> **§ 1. Size of counties — Exceptions.** — No county now established shall be reduced to an area of less than six hundred square miles nor to less than five thousand inhabitants; nor shall any new county be established with less than six hundred square miles and five thousand inhabitants. Provided, that this section shall not apply to the counties of Lafayette, Pope and Johnson, nor be so construed as to prevent the General Assembly from changing the line between the counties of Pope and Johnson.
>
> **§ 2. Consent of voters to change of county lines.** — No part of a county shall be taken off to form a new county or a part thereof without the consent of a majority of the voters in such part proposed to be taken off.
>
> **§ 3. Change of county seats — Conditions — New counties.** — No county seat shall be established or changed without the consent of a majority of the qualified

voters of the county to be affected by such change, nor until the place at which it is proposed to establish or change such county seat shall be fully designated. Provided, that in formation of new counties the county seat may be located temporarily by provisions of law.

§ 4. Lines of new counties — Distance from county seat of adjoining county — Exception. — In the formation of new counties no line thereof shall run within ten miles of the county seat of the county proposed to be divided, except the county seat of Lafayette County.

§ 5. Sebastian County — Districts. — Sebastian County may have two districts and two county seats, at which county, probate and circuit courts shall be held as may be provided by law, each district paying its own expenses.

Amendment 45 requires that each County have at least one representative. Amendment 23, Section 3, which, arguably, is still valid and in effect because of the admitted invalidity of that part of Amendment 45 which attempts to freeze the boundaries of State Senatorial Districts, requires that County lines be observed in the formation of Senatorial Districts and that substantial equality of representation be sought. Amendment 55 guarantees to each County a degree of self-government through the recognition of "local legislative authority." The obvious purpose of the foregoing constitutional provisions is to confer upon Arkansas Counties constitutional protection of their existence, territorial integrity and self-government.

Observe that the pertinent reapportionment provision of the Constitution of Virginia makes no mention of territorial representation.

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

Revised Virginia Constitution, Art. II, § 6.

Apparently, the Virginia policy of respecting political subdivision boundary lines was a general policy urged upon and accepted by the Supreme Court of the United States. In contrast, Arkansas counties are blessed with extensive constitutional protection, and certainly that protection would be recognized under the rule of *Mahan* v. *Howell, supra,* as justifying implementation of the appropriate provisions of Amendments 23 and 45 in the reapportionment process.

The Board was without legal authority to deviate from the provisions of Amendment 45 as to State House of Representative Districts or the provisions of Amendment 23 as to State Senatorial Districts, and its Order is, thereby, void.

CONCLUSION

For the foregoing reasons, this honorable Court should declare the Board of Apportionment's Order void and revise the Board's final apportionment to bring it into compliance

with the appropriate provisions of Amendments 23 and 45.

Respectfully submitted,

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Attorney for Petitioners

Supreme Court of Arkansas

John F. Wells, Individually, and
The People of the State of
Arkansas Upon the Relation
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Vs. No. 81-160

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AN ORIGINAL ACTION
UNDER AMENDMENT 45 TO
THE CONSTITUTION OF ARKANSAS

REPLY BRIEF FOR PETITIONERS

ARGUMENT

THE BOARD ERRED IN NOT ASSIGNING AT LEAST ONE STATE REPRESENTATIVE TO EACH COUNTY AND IN NOT MAINTAINING THE INTEGRITY OF COUNTY LINES IN THE FORMATION OF STATE SENATORIAL DISTRICTS.

The central issue in this action is whether Constitution of Arkansas Amendments 23, as to State Senate Districts, and 45, as to State House of Representatives Districts, are consistent with current Federal law on state legislative reapportionment. Regrettably, Respondents have taken the position that these constitutional provisions are invalid.

The real problem rests in trying to decipher the current Federal law. Although Petitioners and Respondents predictably place different interpretations upon the importance and effect of *Mahan* v. *Howell*, 410 U.S. 315, 93 S. Ct. 797, 35 L. Ed. 2d 320 (1973), the most recent Supreme Court of the United States reapportionment decision, the case clearly indicates that the law is evolving.

For the following reasons, Petitioners respectfully urge that Respondents should have observed the pertinent provisions of Amendments 23 and 45 in devising their reapportionment plan:

1. This Court has never held that either amendment violated the Federal Constitution. In *Faubus* v. *Kinney*, 239 Ark. 443, 389 S.W. 2d 887 (1965), this Court acknowledged that a three-judge Federal District Court had invalidated certain provisions of Amendment 45 and that under the Federal Court's logic certain provisions of Amendment 23 would also have been unconstitutinal. This acknowledgement does not in any manner indicate agreement with or acceptance or affirmance of the Federal Court's ruling or reasoning.

2. If the Amendment 45 provision regarding State Senate Districts is constitutionally offensive, the corresponding provision of Amendment 23 controls.

> Where there is, by a general clause, a repeal of all acts and parts of acts inconsistent with the statute, and it is apparent that the repealing statute is to be substituted for the one repealed, the unconstitutinal character of the repealing statute will not be impliedly repealed by inconsistency with a subsequent unconstitutional one.

St. Louis, I.M. & So. Ry. Co. v. *State*, 86 Ark. 343, 111 S.W. 260 (1908), quoted with approval in *Faubus* v. *Kinney, supra.*

3. Because the Constitution of Arkansas confers constitutional protection upon the existence, territorial integrity and self-government of Arkansas Counties, the State of Arkansas is fully justified in relying upon the "Federal analogy" in the apportionment of the Arkansas House of Representatives.

Measured by population, California is 55 times larger than Alaska (California, 22, 694,000; Alaska, 406,000; Source: *The World Almanac & Book of Facts 1981*, pp. 677 and 679). Each State has the same number of United States Senators. Pulaski County is only 50 times larger than Calhoun County. If one were to apportion State Representative Districts based upon Amendment 45 and if Pulaski County were to receive only one additional Representative of the remaining 25, Pulaski County voters would be twice as well represented in the Arkansas House of Representatives as would the voters of California in the United States Senate.

In *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the Supreme Court of the United States attempted to head off the application of the Federal analogy to state legislative reapportionment without a detailed examination of the legal and constitutional status of counties in each of the 50 States. Reyling only upon the facts then before him concerning Alabama Counties, Mr. Justice Warren extrapolated from those facts that all States' counties had similar status.

> Legislative apportionment in Alabama is signally illustrative and symptomatic of the seriousness of this problem in a number of the States.

377 U.S. at p. 533

Attempted reliance on the Federal analogy appears often

> to be little more than an after-the-thought rationalization offered in defense of maladjusted state apportionment arrangements.

Id. at p. 573.

> Political subdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.

Id. at p. 575.

It is obvious that the foregoing conclusions were not based upon any knowledge of the constitutionally protected existence of the Counties of Arkansas. The Federal analogy does apply to the Arkansas House of Representatives; equal representation is obtained in the Arkansas Senate.

4. This Court's concern with equal representation has always been expressed in terms of equality under the then existing constitutional provisions regarding reapportionment.

5. To the extent that this Court should take cognizance of expressions of popular will, as it apparently did in *Faubus* v. *Kinney, supra,* Petitioners call the Court's attention to two recent instances in which voters of Arkansas expressed an overwhelming support for the Arkansas Constitution's reapportionment scheme. In the general election of 1970, by a vote of 223,334 for and 301,195 against, the voters of Arkansas rejected a proposed new constitution which contained the following apportionment language:

> Single-member Districts. For the purpose of electing members of the House of Representatives and the Senate the State shall be divided into as many districts as there shall be members of each house. Each district shall consist of compact and contiguous territory. The districts for each house shall be so nearly equal in population that the district with the greatest population shall not exceed the district with the least population by more than fifteen percent. The population of each distsrict for the purpose of representation shall not include inmates of prisons, hospitals for the insane, or similar institutions.

By an even greater margin, the voters of Arkansas rejected another proposed new constitution by a vote of 276,257 for and 464,257 against at the general election of 1980. That document contained the following language under the heading of "Legislative Districting."

> The State shall be divided into as many House districts as there are Representatives and as many Senate districts as there are Senators. Each district shall elect one Representative or Senator. Each district shall consist of compact and contiguous territory and shall, so far as practicable, observe county and existing political subdivision boundaries. All districts shall be as nearly equal in population as practicable. In determining representation, adjustments shall be made for persons counted in the federal census who were not legal residents of the districts where they were counted.

6. It is not Petitioners' duty to propose a reapportionment plan or to show this Court how the Respondents should have discharged their constitutional duty in a manner consistent with a dynamic, rather than static, Federal law. Petitioners would point out that on June 15, 1981, Independent Voters of

Arkansas, Inc. submitted to the Respondents, in their capacity as the Board of Apportionment, one proposal each for reapportionment of State Senate and Representative Districts which complied with our State's Constitution.

CONCLUSION

For the foregoing reasons and the reasons cited in the Brief herein, this honorable Court should declare the Board of Apportionment's Order void and revise the Board's final apportionment to bring it into compliance with the appropriate provisions of Amendments 23 and 45.

Respectfully submitted,

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NO. 81-1477

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JOHN F. WELLS, INDIVIDUALLY, AND THE PEOPLE OF THE STATE OF ARKANSAS, UPON THE RELATION OF JOHN F. WELLS ..... *Petitioner*

VS.

FRANK WHITE, GOVERNOR, PAUL RIVIERE, SECRETARY OF STATE, AND STEVE CLARK, ATTORNEY GENERAL, CONSTITUTING THE BOARD OF APPORTIONMENT OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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SC — 82-7230 50 COPIES

QUESTIONS PRESENTED FOR REVIEW

1. DID THE ARKANSAS SUPREME COURT ERR IN HOLDING THAT THE ARKANSAS BOARD OF APPORTIONMENT CORRECTLY DREW AND ADOPTED 1981 SENATORIAL AND REPRESENTATIVE DISTRICTS? DOES APPLICATION OF SECTIONS TWO AND THREE OF AMENDMENT FORTY-FIVE RESOLVE PROBLEMS WITH AND OBJECTIONS TO THE APPORTIONMENT SYSTEM IN OTHER STATES?
2. CAN THE STATUS OF ARKANSAS COUNTIES JUSTIFY THE APPLICATION OF A "FEDERAL ANALOGY" FOR THE APPORTIONMENT OF THE ARKANSAS GENERAL ASSEMBLY?
3. HAS PETITIONER TOTALLY FAILED TO PRESENT FACTS WHICH COULD LEAD THIS COURT TO THE CONCLUSION THAT SECTIONS TWO AND THREE OF AMENDMENT 45 TO THE ARKANSAS CONSTITUTION COULD BE FOLLOWED AND FEDERAL CONSTITUTIONAL STANDARDS MET?

PARTIES TO THE PROCEEDINGS

Petitioner is John Wells, a citizen and taxpayer of the State of Arkansas [hereinafter "Petitioner"].

Respondents are the members of the Arkansas State Board of Apportionment per Amendment 45, Section 1 to the Arkansas Constitution of 1874; namely, Governor Frank White, Secretary of State Paul Riviere and Attorney General Steve Clark [hereinafter "Respondents"].

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Respondents find no error in Petitioner's Statement of the Case.

SUMMARY OF RESPONDENTS' ARGUMENT

1. Respondents submit that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964) and its successors, requires that population equality among districts in state reapportionment is the paramount and overriding consideration.

2. Thus, §§2 and 3 of Amendment 45 to the Arkansas Constitution of 1874, and its predecessors, Article 8 and Amendment 23, requiring that (1) each of the 75 Arkansas counties shall have at least one representative, with the remaining 25 equally distributed, (as nearly as practicable) among the more populous counties of the State and (2) no county shall be divided in the formation of state senatorial districts, are unconstitutional under the Court's precedents.

3. A brief review of the size of the population disparity among representative districts if Amendment 45, §2 were followed indicates that provision's facial unconstitutionality.

ARGUMENT

I.

THE ARKANSAS SUPREME COURT DID NOT ERR IN HOLDING THAT THE ARKANSAS BOARD OF APPORTIONMENT CORRECTLY DREW AND ADOPTED 1981 STATE SENATORIAL AND REPRESENTATIVE DISTRICTS AND APPLICATION OF SECTIONS TWO AND THREE OF AMENDMENT FORTY-FIVE DOES NOT RESOLVE PROBLEMS WITH AND OBJECTIONS TO THE APPORTIONMENT SYSTEM IN OTHER STATES.

A. Current Federal Law *Requires* that Substantial Population Equality Among Districts Is The Primary And Overriding Consideration In Reapportionment of State Legislatures.

This Court rendered a landmark decision in 1962 called *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663, holding that federal courts have jurisdiction with respect to controversies relating to state legislative apportionment.

Subsequently, on June 15, 1964, the United States Supreme Court handed down a series of decisions, referred to as the Reapportionment Cases, holding that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires that a bicameral state legislature be apportioned so that, as nearly as possible, each member of each house represent the same number of people. *Reynolds v. Sims, supra*; *WMCA, Inc. v. Lonenzo*, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed. 2d 568; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed. 2d 595; *Davis v. Mann*, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed. 2d 609; *Roman v. Sincock*, 377 U.S. 695,

84 S.Ct. 1449, 12 L.Ed. 2d 620; and *Lucas v. Forty-Fourth Colorado General Assembly*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed. 2d 632.

The rule adopted pursuant to this line of cases has become known as the "one man/one vote" principle. This principle does not require exact mathematical equality in representation, but mandates "insofar as practicable" that each member of both houses of a bicameral state legislature represents the same number of people.

The 1981 Arkansas Board of Apportionment, according to its "Standards, Guidelines and Declarations of Purpose" made its primary and overriding consideration in arriving at a plan of apportionment, that of substantial population equality between the various districts of each house in accordance with the rules set out by this Court in the above-cited cases.

This Court has continually stated that the beginning point in constructing a valid redistricting plan is population equality. In *Mahan v. Howell*, 410 U.S. 315, 324-325, which Appellant relies on for the proposition that the one man/one vote rule has been rewritten, the Court stated:

> We reaffirm its [*Reynolds*] holding that 'the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.'

Of course, *Mahan, supra*, was a challenge to the 1971 reapportionment of Virginia's House of Delegates which ultimately was successful.

The United States District Court for the Eastern District of Virginia has just rendered a decision concerning

the 1981 reapportionment of Virginia's House of Delegates finding the plan unconstitutional. *Mahan v. Dalton*, No. 81-0492 (D.C. Va., August 24, 1981). In this case, the rule of *Reynolds, supra*, was used as the standard by which to judge the plans and because of a twenty-five percent total population variance, the plan was stricken as unconstitutional. At page 21 of the text, the Court states:

> Guided by the precepts that the Supreme Court has explained . . . we conclude that the Act [of reapportionment] is facially unconstitutional . . . (Emphasis supplied)

B. Sections Two and Three Of Amendment 45 To The Arkansas Constitution of 1874 Have Been Held Unconstitutional By The United States District Court, Eastern District Of Arkansas.

One month after the reapportionment cases were rendered by the United States Supreme Court, John Yancey, a citizen and qualified elector of Pulaski County, Arkansas, commenced an action against the 1961 Board of Apportionment, alleging that the scheme of apportionment and reapportionment described by Amendment 45 did not meet the standards laid down by the Supreme Court and he prayed that Sections 2 and 3 of the Amendment be declared unconstitutional. The District Court, in an Opinion written by Chief District Judge Henley, carefully analyzed the history of Arkansas reapportionment beginning with the original Constitution of 1836, Art. IV. The Court noted that under Section 2 of Amendment 45 to the Arkansas Constitution, house apportionment, while based on population, was limited by the guarantee of at least one representative to every county. Realizing that this left only

25 seats to be apportioned according to the "one man/one vote" principle, the District Court held:

> Nor do we think that the apportionment of the Arkansas House of Representatives [under Section 2 of Amendment 45] meets the constitutional standard laid down by the Supreme Court of the United States.

Yancey v. Faubus, 238 F.Supp. 290, 299 (1965).

Moreover, the Arkansas Court held that the method of apportionment provided in Section 3 of Amendment 45 was unconstitutional. Section 3 provides that senatorial districts as constituted and existing at the time of *Pickens v. Board of Apportionment*, 220 Ark. 145, 346 S.W.2d 556 (1952) "shall remain the same and the number of senators from the district shall not be changed."

After the United States Supreme Court decisions of 1964, the District Court in *Yancey, supra*, recognized that Arkansas' constitutional scheme set out in Section 3 of Amendment 45 could not stand, finding:

> Accepting, as we must, the decisions of the Supreme Court of the United States as ruling here, it is clear to us that the apportionment of the membership of the Arkansas Senate required by Amendment 45 is unconstitutional.

Id. at 296.

The Arkansas Supreme Court in *Faubus v. Kinney*, 239 Ark. 443, 398 S.W.2d 887 (1965) held that the only remaining language of Sections 2 and 3 of Amendment 45 to the Arkansas Constitution which were valid were those provisions fixing the membership of the House at 100 and the

membership of the Senate at 35 for the Arkansas General Assembly.

The two issues before the Supreme Court in *Faubus* were (1) whether the decision [Yancey] of the Federal District Court, invalidating the apportionment in Section 3, also invalidated the provisions of those same sections providing that the House of Representatives would consist of 100 members and that the Senate should consist of 35 members and (2) whether the Board of Apportionment was the proper authority to apportion under the Constitution of Arkansas. The Court found that the numerical requirements of 135 set out by Sections 2 and 3 were "completely independent requirements." The Supreme Court quoted the following rule from 16 Am. Jur. 2d, Constitutional Law, §42 (1964):

> The question may arise as to the effect of partial invalidity of a constitutional amendment. In accordance with the rules governing the invalidity of portions of a statute, it has been held that where part of an amendment to a state constitution is invalid because it violates the Federal Constitution, if the several parts of the amendment are separable, the valid portions may be saved, unless it is obvious that the intent of the adoptors of the amendments was to accept one general scheme in an entirety, in which event, if part of the amendment falls, the whole must fall with it.

Id. at 447. *See, also, Bailey, Lieutenant Governor v. Abington,* 201 Ark. 1072, 148 S.W.2d 176 (1941). The Court continued:

> We think, unquestionably, that the people would have passed the provisions in Amendment 45,

> fixing the House membership at 100 members and the Senate membership at 35, irrespective of whether the other provisions have been contained in the sections.

Id. at 447.

It is clear that the provisions of Amendment 23, mandating that no county lines be crossed in the formation of senatorial districts, cannot stand as completely independent requirements of the Arkansas Constitution. They are an integral part of the scheme outlined by the Amendment. Those provisions deal with the method of apportionment and must fail because they violate the Federal Constitution, unlike those provisions upheld in *Faubus v. Kinney*. The Arkansas Supreme Court so recognized in *Faubus* at 449, when it stated:

> It is true that certain provisions of Amendment 23 would also be unconstitutional under the decision by the Federal District Court, but, as previously stated, the number constituting house and senate membership is not affected and the creation of the Board of Apportionment is not affected.

Thus the Arkansas Supreme Court has only upheld those provisions specifically set out in the *Faubus* decision as not violative of the Federal Constitution. All other provisions of Art. VIII, Amendment 23 and Amendment 45, which are in direct conflict with the Federal Constitution, obviously must fall and that Court has so held in its Opinion delivered November 2, 1981. *See,* Petitioner's Appendix, page 4.

The very sections under which Petitioner challenges the actions of the Board of Apportionment were found un-

constitutional *sixteen years ago*, and again last year by the Arkansas Supreme Court.

C. *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 797, 35 L. Ed. 2d 320 (1973) Does Not Represent A "Substantial Revision Of The Rule" Of *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964) And Its Successors.

As Petitioner cites in his Petition at Page 13, *Mahan v. Howell, supra*, does *not* represent a substantial revision of the rule of *Reynolds v. Sims, supra*. This quote from *Mahan, supra*, is illustrative:

> For a state's policy urged in justification of disparity in district population, however rational, *cannot constitutionally be permitted to emasculate the goal of substantial equality*. (Emphasis supplied)

Id. at 326. Moreover, the Virginia Constitution, Art. VII, Sections 2 and 3, gave Virginia's Legislature extensive power to enact special legislation regarding the organization of and the exercise of governmental powers by counties, cities, towns and other political subdivisions. Thus, Virginia's policy of maintaining political subdivisions intact was the reasonable justification for the disparity in population of the challenged plan. Under these circumstances, a large variance was allowed to give county, etc. residents an effective voice in their state government.

Arkansas has no such justification as Amendment 14 to the Arkansas Constitution prohibits special legislation.

Certainly, *Cosner v. Dalton, supra*, lays to rest any such argument as the District Court of Virginia, the State

out of which *Mahan* arose, unquestioningly follows the one man/one vote rule of *Reynolds v. Sims, supra,* and strikes the House of Delegates plan as facially unconstitutional thereunder.

II.

THE STATUS OF ARKANSAS COUNTIES CANNOT JUSTIFY THE APPLICATION OF A "FEDERAL ANALOGY" FOR THE APPORTIONMENT OF THE ARKANSAS GENERAL ASSEMBLY.

Petitioner correctly cites federal law concerning the application of a "federal analogy" to state reapportionment at pages 11 and 12 of his Petition.

The description of counties as "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions", cited in Petitioner's Petition at page 11, applies equally to counties in Arkansas as well as Alabama, the State out of which *Reynolds, supra,* arose. Respondents don't deny that Arkansas counties possess a degree of self-government but this argument can obviously not be used to circumvent federal constitutional rights. Petitioner does not cite one federal precedent in this regard. The admonition found in *Reynolds v. Sims,* is as timely and applicable now as it was eighteen years ago:

> Carried too far, a scheme of giving at least one seat in one house to each political subdivisions (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the

> number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible.

Id. at 581.

III.

PETITIONER HAS TOTALLY FAILED TO PRESENT FACTS WHICH COULD LEAD THIS COURT TO THE CONCLUSION THAT SECTIONS TWO AND THREE OF AMENDMENT 45 TO THE ARKANSAS CONSTITUTION COULD BE FOLLOWED AND FEDERAL CONSTITUTIONAL STANDARDS MET.

Petitioner has not even attempted to show this Court in what manner the Board of Apportionment could have followed Sections 2 and 3 of Amendment 45 to the Arkansas Constitution and still have met federal constitutional standards. Indeed, this is impossible.

Even a cursory examination of the census populations by county for 1980 reveal that Arkansas' smallest, Calhoun County, with a population of 6,079 persons would enjoy much greater representation than Pulaski County, with 340,613 persons, were one representative accorded to each without respect to population. The ideal population of a representative district is 22,855 persons, which represents the total number of Arkansas counties divided into the State's total population. The total population of the 44 counties having less than the ideal would be 602,872 persons or an average representation ratio of one representative per

13,702 persons. This average is 40.1% below the ideal for those 44 counties. The range of percentages below the ideal varies from 70.6% in Calhoun County to 5.3% in Jackson County. The remaining counties of Arkansas having a total population of 1,682,641 persons, would have to be represented by 56 representatives according to Petitioner's argument, or an average of one representative per 30,047 persons. This average would be 31.5% above the ideal district. It is statistically impossible to obtain the constitutional goal of substantial population equality and follow the mandate of Sections 2 and 3 of Amendment 45 to the Arkansas Constitution.

CONCLUSION

Based upon the foregoing legal precedents, Respondents respectfully pray that Petitioner's Petition be denied.

Respectfully submitted,

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